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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

ABRAHAM GUTIERREZ,
RESPONDENT.
On Petition for a Writ of Certiorari to the
California Court of Appeal, Second District, Division Seven

PETITION FOR WRIT OF CERTIORARI

GIL GARCETTI
District Attorney
County of Los Angeles, California

GEORGE M. PALMER
Acting Head Deputy
Appellate Division

GEORGE G. SIZE
BRENT RIGGS (Counsel of Record)
Deputy District Attorneys

849 South Broadway, Suite 1100
Los Angeles, California 90014-3570
Telephone: (213) 974-1615

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75 pp

QUESTION PRESENTED

A California jury convicted the defendant of crimes of violence, and the state appellate courts affirmed the convictions. After the affirmance, the victim of the crimes died, allegedly from the injuries the defendant inflicted upon her in the crimes of which he had been convicted. As a result, the state has now charged the defendant with the victim's murder.

Does the Due Process Clause of the Fourteenth Amendment require the state trial court in the pending murder trial to allow the defendant to religate the issues resolved by these prior convictions?

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PETITION FOR WRIT OF CERTIORARI

The People of the State of California respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal for the State of California, Second Appellate District, Division Seven, in this case.

OPINION BELOW

The opinion of the Court of Appeal (App., *post*, A-1 to A-34) is reported as *Gutierrez* v. *Superior Court*, 24 Cal.App.4th 153, 29 Cal.Rptr.2d 376 (1994).

JURISDICTION

The Court of Appeal entered its judgment on April 15, 1994, and denied a rehearing on May 10, 1994. On August 11, 1994, the California Supreme Court denied a timely petition for review.

Title 28, United States Code, section 1257(a), confers jurisdiction on the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . ." U.S. CONST., Art. III, § 2.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; . . . ." U.S. CONST., Amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . ." U.S. CONST., Amend. VI.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., Amend. VII.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., Amend. XIV, § 1.

The appendix, *post*, contains the text of California statutes involved in the issues in this case.

STATEMENT OF THE CASE

The Los Angeles County District Attorney, representing the People of the State of California, filed an information in the Los Angeles County Superior Court charging Abraham Gutierrez with the murder of Sandra Zarate. The People of the state are the petitioner here, and Gutierrez is the respondent. The District Attorney asked the superior court for an order barring Gutierrez from relitigating the issues resolved by his previous convictions for shooting at the car in which Zarate rode,[1] attempting to murder her (without premeditation and deliberation),[2] and personally and intentionally inflicting great bodily injury upon her by shooting at the car.[3] The superior court ruled that Gutierrez could not litigate those issues at his murder trial.

Gutierrez petitioned the California Court of Appeal, Second District, for a writ of prohibition challenging the trial court's ruling. The Court of Appeal summarily denied the petition, but the California Supreme Court granted Gutierrez's petition for review and ordered the matter transferred to the Court of Appeal with instructions to that court to issue an alternative writ. The Court of Appeal issued the alternative writ and, after receiving a return and answer from the People and a reply from Gutierrez and hearing oral argument, issued its published opinion and order for issuance of a peremptory writ directing the trial court to vacate its ruling and to deny the District Attorney's motion. One justice dissented. The Court of Appeal summarily denied

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1. See CALIFORNIA PENAL CODE section 246. App., *post*,A-39 to A-40.

2. See CALIFORNIA PENAL CODE, sections 187, 189, and 664. App., *post*, A-39, A-40.

3. The jury found three allegations true under CALIFORNIA PENAL CODE sections 12022.5, subdivisions (a), (b), and 12022.7, respectively, App., *post*, A-40 to A-41, as they read at the time of Gutierrez's crimes. See *People v. Gutierrez*, 10 Cal.App.4th at 1737, 13 Cal.Rptr.2d 464 (1992).

the People's petition for rehearing, App., *post*, A-35, and the California Supreme Court summarily denied further review, although one justice would have granted review. *Id.* at A-36. The Court of Appeal has granted the People's request for a stay of the issuance of its remittitur, effectively staying Gutierrez's murder trial until such time as proceedings are concluded in this Court. *Id.* at A-37 to A-38.

A. The Facts Surrounding the Crime and the First Prosecution and Trial

In the pending murder case, the District Attorney has asserted, the trial court has agreed, and neither Gutierrez nor the opinion of the Court of Appeal below has ever disputed this fact: The jury necessarily determined Gutierrez had committed the same criminal acts alleged to have caused Zarate's death in the instant case when the jury found him guilty of attempting to murder Zarate, etc., in the previous prosecution.[4] The opinion of the Court of Appeal states facts surrounding those acts, which occurred on June 2, 1990:

> [Gutierrez] was at a friend's house drinking beer with 30 to 40 of his acquaintances when Zarate and three others drove by; [Gutierrez] and his friends threw beer cans and shouted gang slogans as the car passed; [Gutierrez] pursued the car on a motorcycle; while a second person drove the motorcycle, [Gutierrez] sat on the back with a gun and shot Zarate in the head.

App., *post*, A-2; see Ret. and Answer, App. E therein, Information KA004789. "At the time of the trial, Ms. Zarate remained hospitalized in a coma, suffering brain damage from the gunshot

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4. Jeopardy does not bar Gutierrez's murder trial. *Diaz* v. *United States*, 223 U.S. 442, 448-449, 32 S.Ct. 250, 56 L.Ed. 500 (1912); *People* v. *Bivens*, 231 Cal.App.3d 653, 282 Cal.Rptr. 438 (1991). See App., *post*, A-6, fn. 2.

wound to the head." *People* v. *Gutierrez*, *supra*, 10 Cal.App.4th at 1733.

Concerning the prosecution and trial for the attempted murder, the Court of Appeal said:

> [Gutierrez's] defense was mistaken identity; two defense witnesses testified that [Gutierrez] was not the shooter. The jury found [Gutierrez] guilty of discharging a gun into an occupied motor vehicle (count 2) and attempted murder (count 1), but found the attempt to commit murder was not willful, deliberate, and premeditated; the jury also found true the allegations that [Gutierrez] personally used a firearm and intentionally and personally inflicted great bodily injury on Zarate. [Gutierrez] was sentenced to state prison for a total term of 18 years and 8 months. The judgment was affirmed on appeal in [*People* v. *Gutierrez*, *supra*, 10 Cal.App.4th 1729 (1992)].

App., *post*, A-2 to A-3.

The opinion of the Court of Appeal summarizes the proceedings in the Superior Court in this case, as follows:

> After Zarate's death in January 1993, the People filed in July 1993 an information charging [Gutierrez] with murder. At a pretrial conference on August 4, 1993, the prosecutor informed the court that the People would be seeking a jury instruction that the only issue to be decided is whether Zarate's death was caused by a gunshot wound to her head, as the issue of the identity of the shooter had been established by the prior judgment and the doctrine of collateral estoppel barred [Gutierrez] from relitigating that issue. On August 16, 1993, the People filed a written Motion re Collateral Estoppel, seeking to preclude [Gutierrez] from litigating the issues of his identity as the shooter and his intent to kill. The motion argued that the principle of collateral estoppel justified the court "in instructing the

> jury that [Gutierrez] was found guilty in a prior proceeding of inflicting great bodily harm upon Ms. Zarate as a result of discharging a firearm into an occupied motor vehicle, with the intent to kill her, and that said criminal conviction is an element of the present charge of second degree murder, which need not be relitigated." [Gutierrez] filed written opposition to the motion, which was orally argued on August 20, 1993.
>
> In granting the prosecution's motion, the court stated that it read the verdict forms of the prior attempted murder case, and "I've seen the findings that [the jury] made, and ... the jury has decided these issues, that the defendant had express malice aforethought, that he did the shooting. The only issue is whether or not what he did caused the death. That's the way I see it. . . . [¶] . . . I'm ruling that the defendant is collaterally estopped from relitigating the issue of whether he caused great bodily harm to Miss Zarate as a result of discharging a firearm at an occupied motor vehicle with the intent to kill Miss Zarate."

App., *post*, A-4.

B. How the Federal Question was Presented Below and Resolved by the Court of Appeal

Gutierrez's written opposition in the trial court had argued in support of the proposition that "A review of the direction by the United States Supreme Court leads to the conclusion that . . . the doctrine [of collateral estoppel] is not available to the prosecution in that employment by the government would deny the defendant Due Process of Law." Ret. and Answer, App. D, Notice of Motion and Motion to Exclude Proffered Evidence Pursuant to § 402 of the Evidence Code, 4.

Gutierrez's petition to the Court of Appeal argued in support of the proposition that the use of collateral estoppel "would be in violation of the Due Process Clause of the Fifth Amendment

and in conflict with United States and California Supreme Court decisions interpreting the Due Process Clause." Pet. for Writ of Prohibition and Mem. of Pts. and Authorities, 3. The People's return and answer to the alternative writ argued in favor of the constitutionality of the use of collateral estoppel. Ret. and Answer, 14-17. In his reply, Gutierrez argued that the use of collateral estoppel against him would violate "his right to a jury trial as envisioned by the Sixth Amendment," Reply to Ret., 2, and also violate "Due Process as envisioned by both the United States and California Constitutions," *ibid.*

In its majority opinion, the Court of Appeal said, "'The principles articulated in federal courts concerning the doctrine of collateral estoppel are equally pertinent to state court matters.'" App., *post*, A-6. The Court of Appeal quoted portions of the majority and dissenting opinions in *Ashe* v. *Swenson*, 397 U.S. 436, 443, 464-465, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); the lead *per curiam* opinion in *Simpson* v. *Florida*, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971); and the plurality opinion in *United States* v. *Dixon*, 509 U.S. __, 113 S.Ct. 2849, 2863, 125 L.Ed.2d 556, 577, fn. 15 (1993). App., *post*, A-8 to A-9. The Court of Appeal commented on the passages it quoted from this Court, as follows: "Despite this seemingly absolute language barring the prosecution from asserting the collateral estoppel doctrine against the defendant on a subsequent prosecution, the language remains dictum." *Id.* at A-10.

The majority opinion of the Court of Appeal then reviewed pertinent case law from the federal courts and from state courts both in and out of California. *Id.* at A-10 to A-21. The Court of Appeal noted that "the federal courts are not unanimous on the issue." *Id.* at A-12. The state cases from outside of California the Court of Appeal majority relied most upon were *State* v. *Ingenito*, 87 N.J. 204, 432 A.2d 912 (1981) and *State* v. *Johnson*, 134 N.H. 498, 594 A.2d 1288 (1991). In *Ingenito*, as the majority opinion below noted, App., *post*, A-14, the New Jersey Supreme Court held that the use of collateral estoppel against a criminal defendant at his trial "impinged upon his constitutional

right of trial by jury, *U.S. Const.*, Amend. VI, *N.J. Const.* (1947), Art. I, 9." 432 A.2d at 915. (In *Johnson*, the New Hampshire Supreme Court held in the case before it "that the justifications supporting the State's motion [to apply collateral estoppel against the defendant at trial] are simply outweighed by the defendant's right to require the State to prove, beyond a reasonable doubt, every element of the charge against him." 594 A.2d at 1293.)

The California Supreme Court in *People* v. *Ford*, 65 Cal.2d 41, 50-51, 52 Cal.Rptr. 228, 416 P.2d 132 (1966), had approved application of the doctrine of collateral estoppel against Ford at a jury trial in a criminal prosecution. App., *post*, A-19 to A-20. The majority opinion of the Court of Appeal in this case distinguished the decision in *People* v. *Ford* on three grounds. The first was that "there is no indication in *Ford* that the jury instruction prevented defendant from presenting his defense of diminished capacity or impaired his right to a fair trial on the homicide charge," App., *post*, A-20, whereas Gutierrez "here asserted a mistaken identity defense at his attempted murder trial and would be precluded from presenting this defense under the challenged court order. *Ibid.* Second, said the Court of Appeal, Gutierrez vis-a-vis Ford "is not only asserting the claim that the court order constitutes instructional error, but that it impairs his right to jury trial and to the presumption of innocence." *Id.*, A-20 to A-21. The third ground was stated, "It must also be remembered that Ford was decided before Ashe and Simpson questioned the ability of the prosecution to invoke collateral estoppel against a criminal defendant." App., *post*, A-21.

After its review of the cases, the Court of Appeal held:

> In this case, although the threshold requirements for application of the doctrine of collateral estoppel were met [citation], the prosecution failed to establish that its assertion of the doctrine of collateral estoppel is consistent with principles of due process and sound judicial policy. "Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."

> [Citation. Fn. omitted.] [¶] In this case, the assertion of collateral estoppel by the prosecution deprives [Gutierrez] of the right to present his defense to the jury. To the extent he did not testify at his attempted murder trial and wishes to do so in the instant trial, the court's ruling would also preclude him from presenting evidence and defenses which, for whatever reason, may not have been presented at the prior trial. Thus, the interests of petitioner far outweigh any interest in judicial economy.

App., *post*, A-21 to A-22.

The Court of Appeal majority also said:

> We also question whether, as a practical matter, the murder trial can be limited to the issue of causation and the jury instructed in the manner requested by the prosecution without causing prejudice to [Gutierrez] as to the issue actually to be decided by the jury in such a limited trial. This is so because a jury so instructed could not help but infer that the defendant had either admitted the other issues or another jury had already decided them against him. Either inference creates "a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammelled in its deliberations." (State v. Ingenito, supra, 432 A.2d 912, 918-919.)

(App., *post*, A-23.)

The dissenting opinion from the Court of Appeal noted that the question raised by Gutierrez's petition "has divided both federal courts [citations] and state courts [citations]," *Id.* at A-24, and went on to discuss the California cases. The dissent said, "A criminal defendant may be estopped from presenting a defense." *Id.* at A-26.

REASONS FOR ALLOWANCE OF THE WRIT

This petition focuses on the use of collateral estoppel to prevent a criminal defendant at trial from relitigating issues already resolved against the defendant in a previous prosecution; state and federal courts have endorsed its actual use. But language in opinions of this Court, where the issue was not even before the Court, have cast doubt on the endorsements given by these other courts and have led some courts to entirely invalidate this use of collateral estoppel. Given the number of recent opinions dealing with the issue which are at odds with the majority of federal court and earlier state court decisions that allow its use, this case presents the Court with a timely opportunity to explain whether, and, if so, why, the federal Constitution constrains the use of collateral estoppel in criminal trials. Review of the issue will show that the Court's dicta on this issue, and the opinion below, misjudge the extent of constitutional constraint and that collateral estoppel can be used in this case, as requested by the prosecution, consistent with the defendant's jury trial and due process rights.

I. It is Appropriate to Allow the Writ Before Trial

The circumstances here demonstrate the need in this case for review before trial. The decision below of the Court of Appeal is final, Cal. Rules of Court, Rule 24(a), and constitutes the law of the case, see *Kowis* v. *Howard*, 3 Cal.4th 888, 894, 12 Cal.Rptr.2d 728, 383 P.2d 250 (1992), on the federal issue. However, though Gutierrez awaits his trial for murder, once the trial commences, the federal issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 48, 94 L.Ed.2d 40, 107 S.Ct. 989 (1987). If the Court denies review at this point and the prosecution then secures Gutierrez's conviction, the People "will have prevailed and will have no basis to seek review." 480 U.S. at 48. If, on the other hand, Gutierrez wins an

acquittal, the People "will be barred from seeking review by the Double Jeopardy Clause. [Citations.] Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future." *Ibid.* Nor can the People in anyway resist the order of the Court of Appeal to preserve the issue on the hearing of a contempt citation for its prosecutor. 480 U.S. at 50, fn. 8. The Court of Appeal directed its order to the trial court, not the prosecution. App., *post*, A-24.

II. The Decision Below Underscores the Growing Split in both Federal and State Courts Inspired by Dicta in Opinions from this Court

Federal appellate courts have split regarding the use of collateral estoppel by the prosecution in criminal cases. Foremost among the decisions of federal courts encouraging the prosecution's use of collateral estoppel is that of the Court of Appeals for the Ninth Circuit in *United States* v. *Colacurcio*, 514 F.2d 1 (CA9 1975). Other federal cases had applied collateral estoppel in situations where the defendant's status as an illegal alien had been adjudicated and was relevant to new immigration charges. *Hernandez-Uribe* v. *United States*, 515 F.2d 20 (CA8 1975); *Pena-Cabanillas* v. *United States*, 394 F.2d 785, 786 (CA9 1968); *United States* v. *Rangel-Perez*, 179 F.Supp. 619, 623 (S.D.Cal. 1959). Although the court in *Colacurcio* ruled the trial court improperly applied collateral estoppel in the peculiar circumstances of the case, see also *United States* v. *Bejar-Matrecios*, 618 F.2d 81, 83-84 (CA9 1980), the Court of Appeals disagreed with the defendant's claim that its use in a criminal trial "would ignore the defendant's constitutional right to be confronted with the witnesses against him and his right to have all of the facts decided by the jury," *Colacurcio*, 514 F.2d at 6. The Court of Appeals noted that the defendant had "had the opportunity to cross-examine all witnesses against him and was accorded his constitutional right to trial by jury," *ibid.*, and said:

> While *Rangel-Perez* and *Pena-Cabanillas* are limited to the question of defendant's status, we conclude that the rationale of those cases is equally applicable to those facts actually decided which were essential to the judgment in the prior case.

Ibid. Such is the situation in the instant case where the jury necessarily decided facts essential to Gutierrez's guilt of the charges contained in the verdicts against him at his trial for attempted murder that should not have to be relitigated in his murder trial.

But recently, in a racketeering case, a federal court flatly rejected the use of collateral estoppel against the defendant at trial, and in the process, expressly rejected the rationales upon which it viewed the above Eighth and Ninth Circuit cases as having been decided. See *United States* v. *Pelullo*, 14 F.3d 881, 891, 892-893 (CA3 1994). To do so, the court considered three factors. First, the court quoted some language in Chief Justice Burger's dissenting opinion in *Ashe* v. *Swenson*, *supra*, 397 U.S. 436, 465. In the quoted language from the dissent in *Ashe*, the Chief Justice said, "'[If the defendant] had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial.,'" *Pelullo*, 14 F.3d at 891. Second, the Third Circuit noted its own previous dicta in *United States* v. *De Angelo*, 138 F.2d 466, 468 (CA3 1943), and dicta from other lower federal courts in *United States* v. *Bruno*, 333 F.Supp. 570, 576 (E.D.Pa. 1971), and *United States* v. *Carlisi*, 32 F.Supp. 479, 482 (E.D.N.Y. 1940). Finally, the Third Circuit relied upon state court decisions in *State* v. *Ingenito*, *supra*, 432 A.2d at 915-919, and *People* v. *Goss*, 200 Mich.App. 9, 503 N.W.2d 682, 686-688 (1993), appeal granted, __ Mich. __, 511 N.W.2d 675 (1993). *Pelullo*, 14 F.3d at 891-892.

In *Pelullo*, on a retrial, the trial court had precluded the defendant from contesting his guilt of the predicate act for the racketeering count based upon the defendant's conviction of the

predicate act as a charged crime in the first trial, which conviction had been affirmed on appeal. 14 F.3d at 887. The Third Circuit read the Sixth and Seventh Amendments and Article III, section 2, of the Constitution, *id.* at 894-896, as necessitating "that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial direction attending collateral estoppel," *id.* at 896.

However, in attempting to avoid the absurd consequences of its holding, the Court of Appeals said, as to the conviction for the predicate act, "On remand the district court should conduct a balancing analysis, and state its reasons on the record for admitting or excluding the judgment of conviction," *id.* at 889, without giving it preclusive effect and as "an ordinary piece of evidence," *id.* at 888. But cf. *United States* v. *Pryba*, 680 F.Supp. 790, 792 (E.D.Va. 1988),[5] affirmed, 900 F.2d 748, 758 (CA4 1990), cert. denied, 498 U.S. 924, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990); *Diaz* v. *United States*, *supra*, 223 U.S. at 450 (dicta that right to confront witnesses requires defense consent to admission of record of proceedings in conviction for assault and battery before justice of the peace in trial for resulting manslaughter; no discussion of possible collateral estoppel effect). Thus, the jury on Pelullo's federal retrial may learn of his prior conviction, but will be free to treat it as a nullity.

Although the Court of Appeals in *Pelullo* discussed *Ingenito* and *Goss* and some older Massachusetts cases, see *Commonwealth* v. *Feldman*, 131 Mass. 588 (1881) (conviction for drunkenness conclusive on issue against defendant in later trial of assault charge); *Commonwealth* v. *Evans*, 101 Mass. 25 (1869) (conviction for assault with a knife conclusive against defendant in later

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5. The District Court's opinion in *Pryba* discusses the admissibility of a state court conviction to prove an act of racketeering and states, "While it is true that both sovereigns may not prosecute the same act or acts, this is no reason to refrain from giving preclusive effect to a state conviction in the RICO context. To hold otherwise would ignore settled doctrine giving preclusive effect to convictions, cause a waste of judicial time and resources, and raise the spectre of inconsistent results." 680 F.Supp. at 792.

trial of manslaughter charge), the Third Circuit's opinion did not mention *People* v. *Ford*, *supra*, 65 Cal.2d 41. In *Ford*, the California Supreme Court held that the defendant's prior conviction of robbery sufficed as proof of the robbery in his subsequent felony-murder trial. See App., *post*, A-19 to A-20, quoting the pertinent language from the California Supreme Court in *Ford*, 65 Cal.2d at 50-51.

As the court below noted, the California Supreme Court decided *Ford* before certain dicta from this Court cast doubt on the viability of using collateral estoppel at trial against a criminal defendant. App., *post*, A-21.[6] To the contrary, *Ford* cites *Sealfon* v. *United States*, 332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180 (1948), where this Court said that the doctrine of res judicata "applies to criminal as well as civil proceedings [citations] and operates to conclude those matters in issue which the verdict determined though the offenses be different."

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6. But see *Diaz* v. *United States*, *supra*, 223 U.S. at 450. In *Diaz*, which the court below did not mention, this Court did not discuss the doctrine of collateral estoppel, and the prosecution is not reported as having attempted to use it against the defendant in that case. However, in ruling on the use at a homicide trial of the record of the proceedings of Diaz's earlier trial before a justice of the peace for assault and battery, this Court said:

> True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence.

Ibid.

The opinion below attempts to distinguish *Ford*,[7] App., *post*, A-21, but obviously only makes the attempt because of the majority's reliance upon the dicta the majority opinion drew from the opinions emanating from this Court post-dating *Ford*, *ibid*. As the dissenting justice below notes, the majority opinion fails to rationalize any meaningful basis for differentiating the holding in *Ford* from the holding below. *Id*., at A-29.

III. The Decision Below is Wrong and Involves a Matter of Public Importance

In *Kirby* v. *United States*, 174 U.S. 47, 43 L.Ed. 890 (1899), this Court held that the convictions of three thieves for stealing government property could not serve as conclusive evidence of the stolen nature of that property in a case where the government had charged Kirby with criminal receipt of the property. In so saying, however, the Court made a statement that implicitly recognizes the viability of using the defendant's own conviction against him where the facts the conviction establishes are relevant in a later trial:

> Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons

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7. California courts are bound by the pronouncements of the California Supreme Court in earlier cases until overruled by the Supreme Court or higher authority. *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962). In *Ford*, the California Supreme Court said, "The doctrine of res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different." *People* v. *Ford*, *supra*, 65 Cal.2d at 50, 52 Cal.Rptr. at 233, 415 P.2d at 137.

> was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt.

174 U.S. at 55. In other words, there would have been no objection to using against Kirby the record of his own criminal prosecution.

In *Ashe* v. *Swenson*, *supra*, the Court described as "an extremely important principle in our adversary system of justice" that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. This is "collateral estoppel." *Ibid*.

In *Sealfon* v. *United States*, *supra*, 332 U.S. 575, 578, this Court approvingly cited its opinion by Justice Holmes in *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). The following passage appears in the latter opinion:

> We may adopt in its application to this case the statement of a judge of great experience in the criminal law: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in The Queen v. Miles, 24 Q. B. D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in Commonwealth v. Evans, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. Commonwealth v. Ellis, 160 Massachusetts, 165, Brittain v. Kinnaird, 1 Brod. & B. 432.

242 U.S. at 88.

In the case last-cited in the above-quotation, an English court wrote, just 30 years after our own Constitution took effect:

> The general principle applicable to cases of this description, is perfectly clear; it is established by all the ancient, and recognised by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction of the subject matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it.

Brittain v. *Kinnaird*, 1 Brod. & B. 432, 437, 129 Eng. Rep. 789, 791 (1819).

In *Commonwealth* v. *Evans*, also obviously approved of in the foregoing passage, the trial court had instructed the jury in Evans's trial for the manslaughter of McKenzie that Evans's conviction for assaulting McKenzie with a knife was "conclusive evidence that the use of the knife upon McKenzie was unjustifiable; and that the question whether the knife had been lawfully used by the defendant in self-defence had been determined by that judgment, and was not now open to him." *Commonwealth v. Evans*, *supra*, 101 Mass. at 26. The Massachusetts Supreme Court held:

> Upon general principles, the parties being the same, the former judgment must be held to have established all facts which were involved in the issue then tried, and essential to the judgment rendered upon it. The conviction for assault and battery therefore necessarily excludes all justification which could have been set up under the general issue of not guilty.

101 Mass. at 27.

In *Commonwealth* v. *Ellis*, 160 Mass. 165, 35 N.E. 773 (1893), also cited approvingly in the foregoing passage from *Oppenheimer*, the issue was paternity in a child neglect prosecution.

> [T]he defense was that the child was not the child of the defendant, but was a bastard child of the defendant's wife. To meet this defense, the government put in evidence a record of the second district court of Bristol, showing a prior conviction and sentence of the defendant, under the same statute, for unreasonably neglecting to support the same child. The presiding justice ruled, as matter of law, that the record of the conviction and sentence was conclusive evidence that the paternity of the child was determined, and that the defendant was estopped to set up the illegitimacy of the child as a defense.

35 N.E. at 773. The Massachusetts Supreme Court analyzed the issue as follows:

> The question of the paternity of the child was necessarily involved in the prior conviction of the defendant. That fact having been determined, it cannot again be litigated between the same parties, unless a different rule applies to criminal proceedings from that which obtains in civil proceedings. [Citation.] It is well settled that the rule is the same in both classes of cases.

Ibid. The Massachusetts court's opinion continues with a discussion of its previous opinions in *Evans* and *Commonwealth* v. *Feldman*, *supra*, 131 Mass. 588.

"Certainly there is no constitutional right to use the time of the courts in repetitive litigation of the same issues." Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa Law Review 281, 321. However, decisions such as *Evans* and *Feldman* possess an underlying justification worthier even than the "concerns for efficient judicial administration and judicial perceptions of expeditious public policy," *United States* v. *Pelullo*, *supra*, 14 F.3d at 891, thought insufficient by the Third Circuit to justify estopping a criminal defendant from litigating his guilt of charges of which he has already been duly convicted. The fear

of contradictory verdicts and discrediting our system of justice embodies more than regard for efficiency and expedience. Collateral estoppel balances the respect given the judgments of the courts by a society that depends upon them for final resolution of its disputes, both civil and criminal.

When consistent with the intent with which they were framed, "All laws should receive a sensible construction." *United States* v. *Kirby*, 7 Wall (74 U.S.) 482, 486, 19 L.Ed. 278 (1868). The Constitution could not sensibly enforce a rule that a defendant's alienage can be determined against the defendant in an immigration prosecution without binding effect in later cases; that one can be declared the parent in one criminal proceeding and not the parent in a later one in the same court; that a defendant in a racketeering case must be permitted to litigate "predicate acts" of which he has already been convicted; or that a person can be convicted of a felonious assault or attempted murder, only to be acquitted of a homicide charge by contesting guilt on the same assault. Such a rule should rightly be held up to ridicule. "The former conviction means nothing if it does not mean that the requisite facts were established in the prior proceedings. If the former conviction is to be accepted at all it must be taken as importing its own verity." *People* v. *Majado*, 22 Cal.App.2d 323, 326 (1937).

In *Majado*, the California District Court of Appeal approved application of collateral estoppel against a criminal defendant where the question presented included the same issue before the Massachusetts court in *Ellis* "whether a conviction and judgment on a charge of failing to provide for an illegitimate child is conclusive on the issue of parentage and prevents the defendant from having the same issue retried in a subsequent prosecution on a similar charge in the same court and between the same parties, ..." 22 Cal.App.2d at 324. The California appellate court noted that "Eventually, [the defendant] might secure a jury which would find that he was not the father of the child and, since that judgment could not be set aside, we would then have the same fact judicially determined both ways," *id.* at 327, an

unsatisfactory situation. *State* v. *Braskett*, 10 Ohio Ops. 2d 497, 82 Ohio L.Abs. 161, 162 N.E.2d 922 (Ct. Common Pleas 1959).[8]

> It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad Co.* v. *United States*, 168 U.S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

Frank v. *Mangum*, 237 U.S. 309, 333-334, 35 S.Ct. 582, 59 L.Ed. 969 (1915).

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Southern Pacific Railroad Co. v. *United States*, *supra*, 168 U.S. at 49, 42 L.Ed. 355, 18 S.Ct. 18 (1897).

The same concerns historically applied to the criminal courts. "The principle is as applicable to the decisions of criminal courts

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8. In precluding a criminal defendant from relitigating paternity, the court concluded that "in a case such as this it will not do for the paternity of minor children to be put in issue more than once." 162 N.E.2d at 924.

as to those of civil jurisdiction." *Frank* v. *Mangum*, *supra*, 237 U.S. at 334. The principle applied at both common law and equity, *Hopkins* v. *Lee*, 6 Wheat. (19 U.S.) 109, 113-114, 5 L.Ed. 218, 219-220 (1821), is one of "obvious fitness and propriety," 6 Wheat. at 114, and was early said to have "found its way into every system of jurisprudence," *ibid*. It was said to apply "to sentences of Courts of Admiralty; to ecclesiastical tribunals; and, in short, to every Court which has proper cognisance of the subject-matter, so far as they profess to decide the particular matter in dispute." *Ibid*.

The view of the Third Circuit in *Pelullo*, that the Constitution, by guaranteeing the right to a jury trial, undermines the use of collateral estoppel or res judicata in criminal trials, lacks basis either in the words of the Constitution or in any intent manifest in its enactment. "The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning." *F.H.A.* v. *The Darlington*, 358 U.S. 84, 91, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958).

As authority for its decision, the Third Circuit's opinion in *Pelullo* contains a citation to *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *United States* v. *Pelullo*, *supra*, 14 F.3d at 896. *Winship* holds that due process requires a certain burden of proof, proof beyond a reasonable doubt, in cases with criminal-type penalties. 397 U.S. at 364, 368. To thus state a more stringent burden of proof in criminal cases than for civil cases, however, does not establish that the Framers intended for collateral estoppel to have some lesser effect in criminal cases than in civil cases. The principle of collateral estoppel was a part of every established legal system at the time of the adoption of the Constitution. See *Hopkins* v. *Lee*, *supra*, 6 Wheat. at 113-114 Nothing inherent in the standard of proof beyond a reasonable doubt establishes that the Framers intended collateral estoppel to operate only in civil trials.

In cases like *Carella* v. *California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989), applying *Winship* to the use of conclusive presumptions in criminal cases, the constitutional

problem is that if the presumption is used, then the defendant will *never* have had the benefit of a jury's evaluation of the evidence against him. In contrast, in Gutierrez's case:

> The defendant has had a day in court on the matter; there was an incentive to litigate, and the issue was determined against the defendant. The defendant is not deprived of anything.

Vestal, *op. cit. supra*, at 317; see *Carmody* v. *Seventh Judicial District Court*, 81 Nev. 83, 398 P.2d 706 (1965).[9]

Gutierrez has had a jury fairly evaluate the evidence that he attempted to murder Sandra Zarate, shooting into her car and personally and intentionally inflicting great bodily injury upon her. The jury found this evidence persuasive of his guilt beyond a reasonable doubt.

For the crime of attempted murder that he defended against in that first trial, he faced a sentence at least equal to the sentence he now faces for murder of the second degree.[10] In addition,

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9. In *Carmody*, shortly before their victim died, the Carmodys pled guilty to robbery and received state prison sentences. The Nevada Supreme Court denied the Carmodys' petition to prohibit a subsequent prosecution for murder. In ruling, the court said the Carmodys would not suffer any "fundamental unfairness" in a trial for murder if the robbery convictions precluded them from contending they did not commit the robbery. 398 P.2d at 707.

10. Under the charges at Gutierrez's trial, the jury could have convicted him of attempted premeditated murder. Gutierrez would then have been liable for a sentence of life in prison. CAL. PENAL CODE, § 664, subd. 1; App., *post*, A-40.

However, the jury only convicted Gutierrez of attempted unpremeditated murder. Jeopardy limits the prosecution in this case to now seeking a conviction only of unpremeditated murder, because the People have already once tried and failed to convince a jury that Gutierrez premeditated Zarate's murder. See *United States* v. *Dixon*, *supra*, 509 U.S. at __, 113 S.Ct. at 2861, 125 L.Ed.2d at 574, fn. 10.

(continued...)

Sandra Zarate slept in a coma at the time of the trial for attempted murder. See *People* v. *Gutierrez*, *supra*, 10 Cal.App.4th at 1733. Obviously, the likelihood that she might die from her injuries was more than a remote possibility. Because Gutierrez thus had the incentive to fully litigate the charges against him and did so, his conviction of attempted murder serves in the present murder prosecution as proof beyond a reasonable doubt of that attempt and commands respect alike from court and jury.

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10. (...continued)

The California Penal Code makes unpremeditated murder (murder of the second degree), see CAL. PENAL CODE, § 189; *ante*, at 2-3, punishable by a sentence of 15 years to life in prison, CAL. PENAL CODE, § 190, subd. (a); App., *post*,A-39. Thus, Gutierrez's *potential* sentence in his trial for attempted murder was roughly equivalent to the maximum sentence he can now receive if a jury convicts him of the murder.

CONCLUSION

The state Court of Appeal erred on a matter of federal law that has divided both federal and state courts. This Court should grant certiorari to review the important constitutional question presented in Gutierrez's case.

Respectfully submitted,

GIL GARCETTI
District Attorney
County of Los Angeles, California

by

GEORGE M. PALMER
Acting Head Deputy
Appellate Division

GEORGE G. SIZE
Deputy District Attorney

BRENT RIGGS *(Counsel of Record)*
Deputy District Attorney

849 South Broadway, Suite 1100
Los Angeles, California 90014-3570
(213) 974-1615
Counsel for Petitioner

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ABRAHAM GUTIERREZ,	)	B078255
	)	
Petitioner,	)	(Super.Ct.No.
	)	KA016953)
v.	)	
	)	**COURT OF APPEAL - SECOND DIST. FILED APR 15 1994 Joseph A. Lane Clerk**
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	)	
	)	
Respondent;	)	**Deputy Clerk [stamp]**
	)	
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

PETITION for writ of prohibition. Alfonso M. Bazan, Judge. Petition granted.

H. Russell Halpern for Petitioner.

No appearance for Respondent.

Gil Garcetti, District Attorney, Patrick D. Moran and Brent Riggs, Deputy District Attorneys, for Real Party in Interest.

[24 Cal.App.4th 155]

Petitioner, defendant in a criminal prosecution for murder of Sandra Zarate, challenges an order of the trial court barring him from litigating the issues of identity and intent on the ground that a prior final judgment of conviction for attempted murder of Zarate[1/] collaterally estops him from doing so, leaving for the jury only the issue of whether petitioner's shooting of Zarate caused her death.

[24 Cal.App.4th 156] Petitioner contends that the prosecution's assertion of the doctrine of collateral estoppel denies him his constitutional right to jury trial and to due process of law as guaranteed by both the federal and state constitutions.

FACTUAL AND PROCEDURAL BACKGROUND

According to our opinion on petitioner's prior appeal of his attempted murder conviction, petitioner was at a friend's house drinking beer with 30 to 40 of his acquaintances when Zarate and three others drove by; petitioner and his friends threw beer cans and shouted gang slogans as the car passed; petitioner pursued the car on a motorcycle; while a second person drove the motorcycle, petitioner sat on the back with a gun and shot Zarate in the head.

Petitioner's defense was mistaken identity; two defense witnesses testified that petitioner was not the shooter. The jury found petitioner guilty of discharging a gun into an occupied motor vehicle (count 2) and attempted murder (count 1), but found the attempt to commit murder was not willful, deliberate,

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1/ Zarate was shot in the head in June 1990; at the time of petitioner's trial on various counts, including attempted murder, Zarate was hospitalized in a coma; she died in January 1993. Petitioner was convicted of attempted murder in January 1991, which conviction was upheld on appeal in People v. Gutierrez (1992) 10 Cal.App.4th 1729 [13 Cal.Rptr.2d 464].

and premeditated; the jury also found true the allegations that petitioner personally used a firearm and intentionally and personally inflicted great bodily injury on Zarate. Petitioner was sentenced to state prison for a total term of 18 years and 8 months. The judgment was affirmed on appeal in People v. Gutierrez, supra, 10 Cal.App.4th 1729.

After Zarate's death in January 1993, the People filed in July 1993 an information charging petitioner with murder. At a pretrial conference on August 4, 1993, the prosecutor informed the court that the People would be seeking a jury instruction that the only issue to be decided is whether Zarate's death was caused by a gunshot wound to her head, as the issue of the identity of the shooter had been established by the prior judgment and the doctrine of collateral estoppel barred petitioner from relitigating that issue. On August 16, 1993, the People filed a written Motion re Collateral Estoppel, seeking to preclude petitioner from litigating the issues of his identity as the shooter and his intent to kill. The motion argued that the principle of collateral estoppel justified the court "in instructing the jury that [petitioner] was found guilty in a prior proceeding of inflicting great bodily harm upon Ms. Zarate as a result of discharging a firearm into an occupied motor vehicle, with the intent to kill her, and that said criminal conviction is an element of the present charge of second degree murder, which need not be relitigated." Petitioner filed written opposition to the motion, which was orally argued on August 20, 1993.

In granting the prosecution's motion, the court stated that it read the verdict forms of the prior attempted murder case, and "I've seen the findings **[24 Cal.App.4th 157]** that [the jury] made, and . . . the jury has decided these issues, that the defendant had express malice aforethought, that he did the shooting. The only issue is whether or not what he did caused the death. That's the way I see it. . . . [¶] . . . I'm ruling that the defendant is collaterally estopped from relitigating the issue of whether he caused great bodily harm to Miss Zarate as a result of

discharging a firearm at an occupied motor vehicle with the intent to kill Miss Zarate."

Petitioner filed timely petition for writ of prohibition challenging the August 20, 1993 order. After we denied the petition, petitioner sought review in the Supreme Court, which granted review and transferred the matter to us with directions to vacate our order denying prohibition and to issue an alternative writ. We vacated our prior order and issued alternative writ of prohibition; real party in interest filed a return and answer; petitioner filed a reply to return; oral argument has been had thereon.

I

GENERAL PRINCIPLES OF COLLATERAL ESTOPPEL

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (Lucido v. Superior Court (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 795 P.2d 1223, 2 A.L.R.5th 995]; fn. omitted.)

"Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. [Citation.] As the United States Supreme Court has stated, 'the rule of collateral estoppel in criminal cases

is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality.' (Ashe v. Swenson (1970) 397 U.S. 436, 444 [25 L.Ed.2d 469, 475, 90 S.Ct. 1189]. . . .)" (Lucido v. Superior Court, supra, 51 Cal.3d at pp. 342-343.) Thus, collateral estoppel is not an inflexible, universally applicable principle; policy considerations may limit its use where the limitation on **[24 Cal.App.4th 158]** relitigation underpinnings of the doctrine are outweighed by other factors. (Id. at p. 343.)

"Accordingly, the public policies underlying collateral estoppel -- preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation -- strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (Lucido v. Superior Court, supra, 51 Cal.3d at p. 343.)

In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. (People v. Taylor (1974) 12 Cal.3d 686, 695 [117 Cal.Rptr. 70, 527 P.2d 622].)

The instant case must be distinguished from those situations in which a criminal defendant invokes collateral estoppel as a defense or as a bar to a subsequent prosecution.[2/] Rather, the

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2/ For example, in Ashe v. Swenson, supra, 397 U.S. 436, 445-446 [25 L.Ed.2d 469, 476-477, 90 S.Ct. 1189], wherein a defendant was acquitted of robbery of one of several victims and then charged with robbery of another victim, the Court held that the doctrine of collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy" (id. at p. 445 [25 L.Ed.2d at p. 476]), and "the State could not present the same or different identification evidence in a second prosecution for the robbery . . . in the hope that a different jury might find that evidence more convincing. The situation is constitutionally

(continued...)

instant case involves the assertion of the doctrine by the prosecution to limit petitioner's ability to contest at his trial for murder those issues which were adjudicated against him by the jury on his prior trial and conviction for attempted murder. Although the parties do not bring to our attention any California case on all fours with this one, they discuss cases in our courts and in other jurisdictions wherein the prosecution sought to invoke the doctrine of collateral estoppel against a criminal defendant. Because the United States Supreme Court has adverted to the mutuality aspect of collateral estoppel in criminal cases, even if only in dictum, we believe a discussion of this issue is helpful in developing a conceptual framework to address the issue presented in this case. "The principles articulated in federal courts concerning the doctrine of collateral estoppel are equally pertinent to state court matters." (People v. Nunez (1986) 183 Cal.App.3d 214, 224 [228 Cal.Rptr. 64].)

2/ (...continued)
no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." (Id. at p. 446 [25 L.Ed.2d at p. 477].) The Court in Ashe also found that the jury in the first trial had determined by its verdict that the defendant was not one of the robbers. (Ibid.)

Petitioner herein does not contend the doctrine of collateral estoppel or double jeopardy bars his prosecution for murder. Our decision in People v. Bivens (1991) 231 Cal.App.3d 653 [282 Ca.Rptr. 438], supports the conclusion that his prosecution for murder is not barred because the victim had not died at the time of the prosecution for attempted murder.

[24 Cal.App.4th 159] II

MUTUALITY REQUIREMENT

In United States v. Carlisi (E.D.N.Y.1940) 32 F.Supp. 479, the court quoted at length from a "very interesting, instructive, and well-considered editorial on the subject, 'Res Judicata With Respect to Criminal Judgments'" (id. at p. 482), written by an attorney, Harry G. Anderson, and appearing in the New York Law Journal in December 1939: "'The courts have frequently referred to the principle of res judicata in criminal cases. In transplanting the doctrine, however, to criminal law the requirement of mutuality had to be abandoned. A prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so because the defendant, charged with crime, always has the right to have the jury or the triers of the facts determine anew every element of guilt. People v. Kief, 126 N.Y. 661, 663, [27 N.E. 556]; People v. Walker, 198 N.Y. 329, 334, [91 N.E. 806]. For this reason doubt has been expressed as to whether the doctrine known to the civil law as res judicata is applicable to criminal cases. [Citation.] [¶] In a more precise sense the rule of res judicata as applied in civil law cannot be said to have an exact counterpart in criminal law. There is, however, a rule of estoppel in criminal law akin to res judicata. As thus used it is a "rule of evidence" which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.'" (32 F.Supp. 479, 482.)

Citing Carlisi, the court in United States v. De Angelo (3rd Cir. 1943) 138 F.2d 466, concluded that although a prior judgment of acquittal on related matters can be asserted by the defendant in a subsequent prosecution, there was no "requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense

charged against him and to a jury's independent finding with respect thereto." (Id. at p. 468.)

The foregoing language was cited with approval by the court in People v. Beltran (1949) 94 Cal.App.2d 197, 205 [210 P.2d 238]. In Beltran, the defendant unsuccessfully argued on appeal that his prior acquittal on a charge of kidnapping for purpose of robbery was res judicata on a second trial for robbery; the court concluded that there was "nothing in the record from which it can be said that by the verdict of acquittal of the kidnaping charge the jury found that [the defendant] had no knowledge of the plan to commit robbery." (Id. at p. 207.)

Although the lead opinion in Ashe v. Swenson, supra, 397 U.S. 436 [25 L.Ed.2d 469, 90 S.Ct. 1189] (see fn. 2, ante), alluded in passing to the "lack **[24 Cal.App.4th 160]** of 'mutuality'" in the application of the collateral estoppel doctrine in criminal cases (id., at p. 443 [25 L.Ed.2d at p. 475]), the issue was discussed in the dissenting opinion by Chief Justice Burger: "Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation. Also, courts that have applied the collateral-estoppel concept to criminal actions would certainly not apply [it to] both parties, as is true in civil cases, i.e., here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial." (Id. at pp. 464-465 [25 L.Ed.2d at p. 487]; dis. opn. of Burger, C.J.)

A year after Ashe, a similar factual situation was before the Court in Simpson v. Florida (1971) 403 U.S. 384 [29 L.Ed.2d 549, 91 S.Ct. 1801]. In Simpson, the defendant was convicted of armed robbery of a store manager; after that conviction was reversed on appeal for instructional error, the defendant was retried and acquitted; the defendant was then charged with robbing the store's customer; defendant's motion to quash the information on double jeopardy grounds was overruled and he was convicted by jury of armed robbery. The Supreme Court of

Florida declined review, allowing to stand an appellate court decision that "'appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on . . . the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery.'" (Id. at p. 386 [29 L.Ed.2d at p. 552].) The court's lead per curiam opinion characterized the Florida appellate court's resolution of the issue as "plainly not tenable," and continued to explain that "Indeed, in Ashe itself, we specifically noted that 'mutuality' was not an ingredient of the collateral estoppel rule imposed by the Fifth and Fourteenth Amendments upon the states. [Citation.] It is clear that Florida could not have retried petitioner a third time on the charge of robbing the store manager because it had previously secured a jury verdict of guilty as well as one of acquittal. And, had the second trial never occurred, the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night." (Ibid.)[3/]

3/ More recently, in United States v. Dixon (1993) __ U.S. _ [125 L.Ed.2d 556, 113 S.Ct. 2849], the court addressed the issue of whether the double jeopardy clause bars prosecution on a substantive criminal charge based on the same conduct for which the defendant had been held in criminal contempt of court. Although the collateral estoppel issue was not raised therein, (125 L.Ed.2d at p. 573), a footnote in the plurality opinion (by Justice Scalia, joined by three other Justices) stated: "Under Ashe v. Swenson . . . , an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one -- though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time." (125 L.Ed.2d at p. 577, fn. 15.)

[24 Cal.App.4th 161] Despite this seemingly absolute language barring the prosecution from asserting the collateral estoppel doctrine against the defendant on a subsequent prosecution, the language remains dictum. Apparently, the United States Supreme Court has not yet squarely addressed the issue or offered any theoretical underpinning for such a rule. In the absence of a definitive resolution of the issue of mutuality by the United States Supreme Court, some lower courts have developed justifications for the prosecution's assertion of the doctrine against the defendant in cases involving issues of paternity and citizenship status. Upon a more detailed discussion of these cases, it will become clear why we find these cases distinguishable from the instant case.

[III]

COLLATERAL ESTOPPEL ASSERTED BY PROSECUTION, GRANTED

In a case decided well before Ashe v. Swenson, the court in People v. Majado (1937) 22 Cal.App.2d 323 [70 P.2d 1015], held that "a conviction and judgment on a charge of failing to provide for an illegitimate child is conclusive on the issue of parentage and prevents the defendant from having the same issue retried in a subsequent prosecution on a similar charge in the same court and between the same parties, when the information in the first action has been dismissed after satisfactory completion of probation." (Id. at p. 324.) The court explained: "The crime here is a continuing one, if the appellant continues to fail to care for the child. If the purpose of probation fails and he continues to repeat the offense his very failure to take advantage of the opportunity for reformation offered him by probation would, under his theory, place him in a much better position than if probation was never granted. If it had not been granted in the first place the fact of parentage would have been established for

future cases. But under his view of the statute [Penal Code section 1203.4] this result is defeated by his failure to keep his implied promise to reform and he can, if probation is granted in successive cases, put the People to the expense of many trials before this two-year-old child reaches its majority, in each of which the fact of parentage must again be established. Eventually, he might secure a jury which would find that he was not the father of the child and, since that judgment could not be set aside, we would then have the same fact judicially determined both ways." (Id. at pp. 326-327.)

In United States v. Rangel-Perez (S.D.Cal. 1959) 179 F.Supp. 619, the defendant was convicted after trial in 1943 of illegal entry into the United **[24 Cal.App.4th 162]** States and deported to Mexico; in 1957, defendant was found in California and again charged with illegal entry; the prosecution invoked the doctrine of collateral estoppel to obviate another trial of the nationality-status issue, whereas the defendant moved to strike all evidence of the 1943 adjudication of his alienage and asserted he was entitled to a trial de novo as to each element of the charged offense. The court acknowledged that a "brief review of the reported cases which have come to my attention points up not only the fact that the decisions are in conflict, but also the fact that the majority lean toward acceptance of the view that the doctrine of collateral estoppel, while available to the accused as against the Government, is not available to the prosecutor in Federal criminal cases." (179 F.Supp. at p. 625.) However, the court, citing Majado, found the doctrine available to the government, permitting it to assert that the 1943 proceeding conclusively established that the defendant was an alien as of the date of that prior adjudication. The court noted that "Issues as to status, for example, would seem most appropriate for application of the doctrine -- especially so as to such an unchanging and indeed unchangeable, status as that of natural parent and child, which was involved in People v. Majado, supra, 22 Cal.App.2d 323 . . . ." (179 F.Supp. at p. 625.) Although the court noted that

nationality status can be and frequently is changed from that of alien to that of American citizen through the naturalization process, the defendant in the instant case advanced no such evidence; rather, in his prior trial and in the case at bar defendant advanced the claim that he was a born American citizen, a claim which he had already fully and fairly litigated in 1943. "In this situation it is proper to apply collateral estoppel in favor of the Government." (179 F.Supp. at p. 626.)

The court in Rangel-Perez supported its conclusion on the ground, similar to that advanced in Majado, that defendants should not be provided an incentive for repeat violations of the law. "If the issue of alienage were to be tried each time a defendant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present. . . . [A] defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict. The Government would be estopped by any unfavorable verdict, and accomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would thus be weakened." (179 F.Supp. at p. 626.)

The instant case does not implicate any public policy involving deterrence of repeated violations of the law by petitioner. Accordingly, we do not find **[24 Cal.App.4th 163]** the Majado or Rangel-Perez line of cases dispositive. Moreover, the federal circuits are not unanimous on the issue. "Because of its potential implication for a defendant's rights to confrontation and jury trial, other courts have been reluctant to decide whether the doctrine of collateral estoppel is appropriate in successive criminal proceedings. See United States v. Day, 591 F.2d 861, 892 n. 23 (D.C.Cir. 1979) (Robinson, J., dissenting in part); United States v. Cheung Kin Ping, 555 F.2d 1069, 1076 (2d Cir.1977)."

(United States v. Bejar-Matrecios (9th Cir. 1980) 618 F.2d 81, 83, fn. 2.)

We now turn to an examination of the cases, brought to our attention by the parties herein, in which the courts have held, on various theories, that the prosecution cannot invoke the doctrine of collateral estoppel against a defendant in a criminal case.

[IV]

COLLATERAL ESTOPPEL ASSERTED BY PROSECUTION, DENIED

In State v. Stiefel (Fla.App. 1972) 256 So.2d 581, the state appealed from an order dismissing an information charging defendant with manslaughter resulting from operation of a motor vehicle while intoxicated and with culpable negligence on double jeopardy grounds, as the defendant had suffered a prior conviction of drunk driving. The court held that the prior conviction was not a bar to the manslaughter charge on double jeopardy grounds, and the doctrine of collateral estoppel was simply inapplicable: "The doctrine cannot apply, however, when as here the issue has been resolved against the accused. This is so because if it were to be given any effect at all in such case the trial court in the subsequent prosecution could charge the jury, or consider as a matter of law, that such issue had been resolved as a true fact to the detriment of the accused. This would be impermissible of course, under due process considerations which assure an accused a jury trial on all issues relating to each element of a given criminal charge." (256 So.2d at p. 585, emphasis in original.) It is unclear whether the court in Stiefel was applying state or federal principles of due process or relying upon the right to jury trial.

The court clearly grounded its decision in State v. Ingenito (N.J. 1981) [87 N.J. 204] 432 A.2d 912, on the state and

federal right to jury trial. Defendant was charged with several weapons offenses; the charge of possession of a weapon by a convicted felon was severed from a count charging unlicensed transfer of a weapon. After trial of the latter charge, defendant was found guilty and a week later another jury tried defendant on the charge of possession of a weapon by a convicted felon. As to the element of being a **[24 Cal.App.4th 164]** convicted felon, defendant stipulated that he had been convicted in 1961 for breaking and entering and larceny; to prove possession, the prosecution was permitted, over defense objection, to admit evidence of defendant's conviction for unlicensed transfer of the weapons. On appeal, defendant asserted that the prior conviction had been used as a collateral estoppel against him and that a criminal trial use of that doctrine against him was unconstitutional. The Supreme Court of New Jersey agreed with the defendant, holding that "the use of defendant's prior conviction in the trial of this case constituted collateral estoppel against the defendant and impinged upon his constitutional right of trial by jury, U.S. Const., Amend. VI, N.J. Const. (1947), Art. I, ¶ 9." (432 A.2d at p. 915.)

The court in Ingenito began its analysis by noting that the affirmative use of collateral estoppel against a defendant in a criminal prosecution is not predicated upon any constitutional mandate, while the right to jury trial is one of the most cherished rights of Anglo-American jurisprudence, and is a constitutional guarantee to be scrupulously protected from encroachment or impairment with respect to a criminal defendant. (432 A.2d at p. 915.) It then concluded that the application of collateral estoppel against a criminal defendant impairs the right to jury trial in several respects: (1) it invades the factfinding and ultimate decisional functions of the jury ("If an essential element of a case is presented as concluded or settled, effectively withholding from the jury crucial underlying facts, the jury's capacity to discharge fully its paramount deliberative and decisional responsibilities is irretrievably compromised" (id. at p. 916)), and

(2) it conflicts with the presumption of innocence as to every element of a crime and impermissibly shifts the burden of proof to the defendant, in that it "constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations." (Id. at pp. 918-919.)

In a footnote, the court in Ingenito cited People v. Majado, supra, 22 Cal.App.2d 323, and United States v. Rangel-Perez, and acknowledged that "several recent cases have permitted the use of collateral estoppel, the jury right notwithstanding." (432 A.2d at p. 919, fn. 7.) "Most of these cases are limited to instances where the issue foreclosed involved status or did not go to the core of the crime charged or where the proceeding in which estoppel was invoked did not involve a jury trial. . . . To the extent that the analyses or holdings of any of these cases are particularly relevant to the factual posture of this case, we do not believe they adequately or correctly treat the issue of collateral estoppel as violative of the jury right and find them to be unpersuasive authority." (Ibid.)

The Supreme Court of New Hampshire reached a similar conclusion in State v. Johnson (1991) [134 N.H. 498] 594 A.2d 1288, but instead of setting **[24 Cal.App.4th 165]** out a constitutional rule of law applicable to all cases, the court in Johnson adopted a balancing test analysis. Moreover, the New Hampshire court did not go so far as to conclude that the alienage or child support cases such as People v. Majado were wrongly decided; rather the court distinguished those cases as involving the weighing of different policies. "The underlying rationale justifying the application of collateral estoppel in all of these [alienage and child support] cases appears to be the need to preserve judicial resources when an unchanging issue has been determined by a prior conviction. . . . As we have noted on prior occasions, the question of whether collateral estoppel applies in criminal cases is determined by weighing competing policy considerations." (594 A.2d 1288, 1291-1292.) "Where

a prior conviction involves a factual issue that is necessarily determinative of a subsequent prosecution, and the policy considerations justifying the application of collateral estoppel are slight, the State must marshal its evidence and prove its case as completely as it did in the original prosecution." (Id. at p. 1293.)

In Johnson, the defendant was convicted of driving a motor vehicle with a revoked license, the central issue in the case being whether the defendant drove a car on the day of the offense; in defense, defendant testified that he was not driving the car on the day in question. In a subsequent trial for perjury, the State filed a formal motion "requesting the invocation of collateral estoppel to prevent the relitigation of the findings of fact made in the operating-after-revocation proceedings." (594 A.2d at p. 1290.) Applying a balancing test, the court, citing Ingenito, acknowledged the danger that the use of collateral estoppel may impair the defendant's right to a fair trial. The court concluded that "The interests that would best be served by the application of collateral estoppel in this case--deterrence of defendants from giving false testimony, and economy in the use of judicial resources -- are simply outweighed by those considerations which favor the defendant. '"The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy."'" (Id. 594 A.2d at p. 1292.)

More recently, the Court of Appeals of Michigan, in People v. Goss (Mich.App. 1993) [200 Mich.App. 9] 503 N.W.2d 682, after reviewing the case law of other jurisdictions, decided that "a defendant's constitutional right to a trial by jury precludes the application of collateral estoppel to establish facts relating to an essential element in a subsequent criminal prosecution. [¶] In so holding, we adopt the reasoning set forth by the Supreme Court of New Jersey in Ingenito," (503 N.W.2d at p. 686), and "explicitly reject the use of a balancing test under the rubric of due process in making this determination. [Citations.] It is inappropriate to determine the applicability of collateral estoppel case by case in terms of a balancing test weighing competing [24

Cal.App.4th 166] policy considerations because more is at stake than just a defendant's right to due process requiring the state to prove, beyond a reasonable doubt, every element of the charge against him. Accordingly, in the clash between the principle of collateral estoppel and the constitutional right to trial by jury, collateral estoppel must give way to permit a defendant's unfettered exercise of the constitutional right to trial by jury." (Id. at p. 687.)

The procedural posture of the Goss case is similar to the posture of the instant case in that the collateral estoppel issue came to the appellate court prior to the trial in which it was sought to be invoked by the prosecution. In Goss, the defendant was convicted of first degree murder, two counts of assault with intent to commit murder, two counts of criminal sexual conduct, kidnapping, and armed robbery. All counts, except the murder count, were affirmed on appeal; on remand for retrial on the charge of felony murder, the prosecution moved that the jury be instructed that the element of armed robbery necessary to establish felony murder had been proven and was not an issue for the jury to decide. The trial court denied the prosecution's motion, and the prosecution appealed. Accordingly, in both the instant case and Goss, the appellate courts are addressing the issue of collateral estoppel before the trial at which the prosecution seeks to assert it. Thus, the case at bar and Goss are distinguishable from People v. Ford (1966) 65 Cal.2d 41 [52 Cal.Rptr. 228, 416 P.2d 132] a case relied upon by real party.

The dissenting opinion in Goss relied heavily on Ford to support the view that the prosecution should be able to assert the doctrine of collateral estoppel against the defendant. In the case at bar, the prosecution's motion in the trial court relied heavily on Ford, and the trial court at oral argument also expressly cited Ford before making its ruling. Accordingly, Ford merits our detailed analysis.

[V]

RELIANCE ON PEOPLE v. FORD

In People v. Ford, supra, 65 Cal.2d 41, the defendant burglarized the home of John Roope on June 2; on June 9, defendant entered Roope's home, robbed Roope at gunpoint, and forced Roope to drive him to another town, where defendant kidnapped his (defendant's) wife, and assaulted a man with whom his wife was living. Defendant then forced Roope to accompany him, his wife and children, while he drove Roope's car aimlessly about the countryside where, several hours later, he shot and killed a deputy sheriff. In the first trial, a jury found defendant guilty on seven counts, including robbery, kidnapping, and murder. On appeal, the Supreme Court reversed the **[24 Cal.App.4th 167]** judgment on the murder count because of errors in the instructions, affirmed the judgments on the non-homicide counts, and modified the judgment on the burglary count. Although defendant testified on his own behalf at the first trial, he did not do so on retrial; moreover, we infer from the summary of the psychiatric evidence on the first trial (People v. Ford (1964) 60 Cal.2d 772, 787 [36 Cal.Rptr. 620, 388 P.2d 892]) and the summary of such evidence on retrial (People v. Ford, supra, 65 Cal.2d at p. 55), that the evidence presented to the second jury on the element of defendant's intent was different than that at the first trial. At the second trial, defendant offered extensive testimony of three psychiatrists to establish that at the time of the homicide, he did not possess the mental ability to commit first degree murder, due to emotional disturbance, intoxication and malnourishment. (65 Cal.2d at pp. 51-52.) The jury was instructed on both felony murder and on premeditated murder, although the basis of the jury's finding of first degree murder could not be ascertained. On appeal, the Court found that because the prosecution "presented no psychiatric testimony to rebut the evidence introduced by the defense" (65 Cal.2d at p.

55), the evidence was insufficient to support the premeditation requisite to a conviction of willful, deliberate and premeditated murder. (Ibid.) The Court also held that the first degree murder conviction could not be upheld on the basis of the felony murder rule because as a matter of law the robbery had terminated prior to the homicide. (Id. at p. 56.) The Court then concluded that because the kidnapping and the weapon offense were continuing crimes "still in the process of being committed by defendant when the killing occurred" (id. at p. 57), the evidence established "the homicide as murder of the second degree due to the operation of the felony-second-degree murder rule." (Ibid.) The judgment was thus modified by reducing the degree of the crime to murder of the second degree.

One of Ford's appellate contentions with respect to the murder conviction was that "since he was not arraigned on a theory of felony-murder it was error to submit instructions on that issue to the jury. He further claims that the instructions were improper because they told the jury that he had been convicted of robbery, kidnaping and possession of a concealable weapon by an ex-felon, and reserved for the jury only the questions whether the homicide was perpetrated during the commission of any or all of these felonies, and whether he possessed the intent requisite to the various felonies at the time of the commission of the homicide." (65 Cal.2d at p. 50.)

In finding no error occurred in instructing the jury, the Court stated: "It is obvious that the felony convictions obtained at the first trial substantially affected the prosecution and defense upon retrial of the murder charge. The burden upon the prosecution was lessened to the extent that it was permitted the benefit of the felony-murder rule without the necessity of having to **[24 Cal.App.4th 168]** prove the elements of the respective felonies. Nor was the defense permitted to dispute the fact that the necessary elements of the felonies had been conclusively found. These facts do not, however, compel the conclusion urged upon us by defendant. [¶] The doctrine of res judicata

applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. (Sealfon v. United States, 332 U.S. 575, 578 [68 S.Ct. 237, 92 L.Ed. 180]; see Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal.2d 601, 606 [25 Cal.Rptr. 559, 375 P.2d 439].) Thus where a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. (See People v. Beltran, 94 Cal.App.2d 197, 205 . . . .) It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried. Accordingly, it was not error for the trial court to give appropriate instructions that defendant had been convicted of the various felonies, and that if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they might predicate their verdict on the felony-murder rule articulated in Penal Code section 189." (65 Cal.2d at pp. 50-51.)

The case at bar is distinguishable from Ford factually and procedurally. In Ford it is also significant that the defendant was permitted to, and did, litigate on retrial the issue of whether he had the intent requisite to the various felonies at the time of the commission of the homicide. In fact, there is no indication in Ford that the jury instruction prevented defendant from presenting his defense of diminished capacity or impaired his right to a fair trial on the homicide charge. Thus, Ford is distinguishable from the instant case because petitioner here asserted a mistaken identity defense at his attempted murder trial and would be precluded from presenting this defense under the challenged court order. Moreover, petitioner is not only asserting the claim that the court order constitutes instructional error, but that it impairs his right to jury trial and to the presumption of inno-

cence. These are issues not considered in Ford. A decision is not authority for issues not considered therein. (People v. Lonergan (1990) 219 Cal.App.3d 82, 93 [267 Cal.Rptr. 887].) It must also be remembered that Ford was decided before Ashe and Simpson questioned the ability of the prosecution to invoke collateral estoppel against a criminal defendant.

For all of the foregoing reasons, Ford is not controlling authority for this case. We proceed to resolve this case on the principles of collateral estoppel set out in Lucido v. Superior Court, supra, 51 Cal.3d 335.

[24 Cal.App.4th 169] [VI]

PROSECUTION CANNOT ASSERT COLLATERAL ESTOPPEL AGAINST PETITIONER

In this case, although the threshold requirements for application of the doctrine of collateral estoppel were met (Lucido v. Superior Court, supra, 51 Cal.3d 335, 339), the prosecution failed to establish that its assertion of the doctrine of collateral estoppel is consistent with principles of due process and sound judicial policy. "'Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.'" (People v. Hogue (1991) 228 Cal.App.3d 1500, 1506 [279 Cal.Rptr. 647].)[4/]

4/ Petitioner relies heavily on Hogue. Although we believe it was correctly decided, the case is distinguishable from the one at bar and not dispositive herein. In Hogue, the defendant was charged and convicted of multiple sex acts on a single victim; on appeal, the court affirmed his convictions of kidnapping for purpose of committing a lewd and lascivious act on a child under 14, lewd and lascivious conduct by force or violence, and oral copulation with a child under 14; a count of penetration with a foreign object on a child under 14 and by a person more than 10

(continued...)

In this case, the assertion of collateral estoppel by the prosecution deprives petitioner of the right to present his defense to the jury. To the extent that he did not testify at his attempted murder trial and wishes to do so in the instant trial, the court's ruling would also preclude him from presenting evidence and defenses which, for whatever reason, may not have been presented at the prior trial. Thus, the interests of petitioner far outweigh any interest in judicial economy.

Moreover, the assertion of the doctrine by the prosecution cannot be said to promote the public policy of protecting litigants from harassment. To the extent that permitting petitioner a full trial on all issues risks a verdict that may be inconsistent with the prior verdict, we note that "Consistency, however, is not the sole measure of the integrity of judicial decisions. We must also consider whether eliminating potential inconsistency (by displacing full determination of factual issues in criminal trials) would undermine public confidence in the judicial system. As has the majority of courts in **[24 Cal.App.4th 170]** other jurisdictions, we conclude it would." (Lucido v. Superior Court, supra, 51 Cal.3d at p. 347.) Accordingly,

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4/ (...continued)
years older was reversed because of error in instructions. On retrial of the latter count, the court granted the prosecution motion to preclude the defendant from litigating the issues of identity and alibi as those issues were adjudicated by the jury in the first trial. In holding the trial court's ruling was error, the appellate court stated that the issue of the identity of the defendant as the person who violated Penal Code section 289, subdivision (j) was not finally decided and affirmed on the merits; that conviction was reversed. (228 Cal.App.3d 1500.) Thus, Hogue is a case in which the threshold requirements for application of collateral estoppel were not met.

There is no contention in the instant case that the issues decided by the prior judgment for attempted murder are not identical to the ones sought to be relitigated.

petitioner's interest in a trial de novo is consistent with maintaining integrity and public confidence in the judicial system, while the application of collateral estoppel threatens those policies. Thus, the policies underlying collateral estoppel are far outweighed by other policies which are vindicated by affording petitioner a trial de novo.

We also question whether, as a practical matter, the murder trial can be limited to the issue of causation and the jury instructed in the manner requested by the prosecution without causing prejudice to petitioner as to the issue actually to be decided by the jury in such a limited trial. This is so because a jury so instructed could not help but infer that the defendant had either admitted the other issues or another jury had already decided them against him. Either inference creates "a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations." (State v. Ingenito, supra, 432 A.2d 912, 918-919.)

We note that the decisions of sister states are persuasive only in the absence of controlling California authority. (Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal.App.3d 805, 811, fn. 2 [279 Cal.Rptr. 179].) In this case, however, it is unnecessary for us to choose between the approach of the Supreme Court of New Hampshire in State v. Johnson, supra, 594 A.2d 1288, which adopted a balancing test analysis, and the approach of the Supreme Court of New Jersey in State v. Ingenito, supra, 432 A.2d 912, which adopted a broad rule barring the assertion of collateral estoppel by the government to establish facts relating to an essential element in a subsequent criminal prosecution. Under both of the foregoing approaches, as well as under the principles of collateral estoppel set out in Lucido, we reach the same result: The trial court's order must be vacated.

DISPOSITION

Let a peremptory writ of prohibition issue directing respondent court to vacate its August 20, 1993, order and to enter a new and different order denying the prosecution's Motion re Collateral Estoppel.

CERTIFIED FOR PUBLICATION

LILLIE, P.J.

I concur:

JOHNSON, J.

CERTIFIED FOR PUBLICATION.

WOODS (Fred), J., Dissenting:

May a criminal defendant be collaterally estopped from presenting all or part of his defense?

This question, raised by the instant petition, has divided both federal courts (compare, e.g., United States v. Rangel-Perez (Cent. Dist. Cal. 1959) 179 **[24 Cal.App.4th 171]** F.Supp. 619; Pena-Cabanillas v. United States (9th Cir. 1968) 394 F.2d 785; United States v. Colacurcio (9th Cir. 1975) 514 F.2d 1 [allowing preclusion against a criminal defendant] with United States v. DeAngelo (3d Cir. 1943) 138 F.2d 466) and state courts (Compare, e.g., Commonwealth v. Evans (1869) 101 Mass. 25; Commonwealth v. Ellis (1892) 160 Mass. 165, 35 N.E. 773; State v. Sargood (1907) 80 Vt. 412, 68 Atl. 51 [allowing preclusion] with People v. Goss (1993) 200 Mich.App. 9, 503 N.W.2d 682. See generally 147 ALR 991; Comment, The Use of Collateral Estoppel Against The Accused (1969) 69 Columbia L.R. 515; 1 Witkin & Epstein, Cal. Criminal Law (2d

ed. 1988) § 356, pp. 411-413). With but one exception,[5/] it has not divided the courts of California.

Our decisions have consistently applied collateral estoppel "'by preventing a party who has had one fair trial on an issue from again drawing it into controversy.'" (Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 605 [25 Cal.Rptr. 559, 375 P.2d 439].) Prosecutors have been estopped from murder prosecutions (People v. Taylor (1974) 12 Cal.3d 686 [117 Cal.Rptr. 70, 527 P.2d 622]) and criminal defendants from presenting a defense (People v. Majado (1937) 22

5/ In People v. Hogue (1991) 228 Cal.App.3d 1500 [279 Cal.Rptr. 647] the defendant was charged with four sex crimes. All "were . . . sex acts upon a single victim closely connected in time." (Id. at p. 1502. Emphasis added.) At his first trial, the defense was alibi and mistaken identity. The jury rejected the defense and convicted defendant on all counts. On appeal, one count was reversed because the trial court failed to instruct on its "10 years older" element. The other three counts were affirmed.

At the second trial, defendant was collaterally estopped from relitigating identity (and therefore alibi). Defendant then waived jury and was found guilty by the court. On appeal, the conviction was reversed on the ground it was error to apply collateral estoppel against defendant.

People v. Hogue is wrongly decided. Irreconcilable with the Supreme Court's decision in People v. Ford (1966) 65 Cal.2d 41 [52 Cal.Rptr. 228, 416 P.2d 132], Hogue offers this metaphysical distinction: "[I]n Ford the issue of defendant's guilt of the underlying felonies had been tried on the merits and affirmed on appeal. In other words, the issue to be decided -- whether the defendant committed certain felonies -- merged with the judgment of conviction of those felonies. By contrast, the issue to be decided here -- the identity of appellant as the person who violated section 289, subdivision (j) -- did not merge with the judgment of conviction on the related counts." (Id. at p. 1504.)

Cal.App.2d 323 [70 P.2d 1015]). Our decisions have fortified "the public interest in determining criminal guilt and innocence at criminal trials" (Lucido v. Superior Court (1990) 51 Cal.3d 335, 352 [272 Cal.Rptr. 767, 795 P.2d 1223]), preserved the integrity of the judicial system, promoted judicial economy, protected litigants from harassment (ibid.), "maintain[ed] the stability of judgments, insure[d] expeditious trials" (People v. One 1964 Chevrolet Corvette Convertible (1969) 274 Cal.App.2d 720, 731 [79 Cal.Rptr. 447]), and spared victims and witnesses from endless court appearances.

All of these interests--with all due respect to the majority opinion--would be served by denying the petition.

[24 Cal.App.4th 172] In sum, my answer to the question is yes. A criminal defendant may be estopped from presenting a defense. Our cases, as I explain, so hold.

CALIFORNIA CASES: A SUMMARY

People v. Majado (1937) 22 Cal.App.2d 323

The defendant was found guilty of failing to provide for his minor child (Pen.Code, § 270; statutory references, unless otherwise noted, are to the Penal Code). He was granted probation and ordered to pay $15 a month. When probation expired defendant ceased payments and was again charged with failure to provide. At this second trial defendant was collaterally estopped from contesting paternity, that issue having been finally decided in the first trial. The Court of Appeal approved use of collateral estoppel against the defendant and affirmed the conviction.

Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601

Teitelbaum was convicted of conspiracy to commit grand theft, attempted grand theft, and filing a fraudulent insurance claim--all arising from his claimed "fur robbery." After this criminal conviction was final, Teitelbaum filed a civil suit against his insurance company alleging the same furs had been robbed and thus were covered by his insurance policy. A jury found in his favor but the trial court ruled the evidence insufficient and granted a new trial. The insurance company moved for judgment notwithstanding the verdict based upon collateral estoppel. The motion was denied.

Justice Traynor, writing for a unanimous court, reversed the trial court order denying the insurance company's motion for judgment n.o.v., holding that a criminal conviction may be conclusive in a subsequent civil action and mutuality is not required for collateral estoppel.

In this landmark case Justice Traynor stated, "Collateral estoppel applies to successive criminal trials and although not widely adopted, has been applied in the better reasoned cases that have dealt with the problem here presented." (Id. at p. 606. Citations omitted.) One of the criminal cases cited with apparent approval was People v. Majado. (Ibid.) Justice Traynor further noted that criminal trials have "rigorous safeguards against unjust conviction, including the requirements of proof beyond a reasonable doubt and of a unanimous verdict, the right to counsel, and a record paid for by the State on appeal. Stability of judgments and expeditious trials are served and no injustice done, when criminal defendants **[24 Cal.App.4th 173]** are estopped from relitigating issues determined in conformity with these safeguards." ((Ibid. Internal citations omitted. Emphasis added.)

People v. Ford (1966) 65 Cal.2d 41

In his first trial, defendant was convicted of burglary, possession of a concealable weapon, robbery, two counts of kidnapping, assault with a deadly weapon, and first degree murder of a police officer. He was sentenced to death. On first appeal, the California Supreme Court reversed the murder conviction for instructional errors but affirmed the other convictions.

In the murder retrial, the trial court gave felony murder instructions and applied collateral estoppel by informing the jury defendant "had been convicted of robbery, kidnaping and possession of a concealable weapon by an ex-felon, and reserved for the jury only the questions whether the homicide was perpetrated during the commission of any or all of these felonies, and whether he possessed the intent requisite to the various felonies at the time of the commission of the homicide." (Id. at p. 50.)

In approving the trial court's use of collateral estoppel against the defendant Justice Peters, for a unanimous court,[6/] stated: "The doctrine of res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. Thus where a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried. Accordingly, it was not error for the trial court to give appropriate instructions that defendant had been convicted

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6/ Justice McComb dissented but not as to this issue.

of the various felonies, and that if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they might predicate their verdict on the felony-murder rule articulated in Penal Code section 189." (Id. at pp. 50-51. Internal citations omitted.)

To avoid the apparent controlling effect of Ford, the majority opinion asserts Ford is "distinguishable . . . factually and procedurally." (Maj. opn., p. 385.) If there is a procedural distinction the majority opinion does not specify it. A procedural distinction is a partial reversal in Ford versus a full affirmance in the instant case. Perhaps the majority opinion is suggesting [24 Cal.App.4th 174] that a judgment, reversed in part, has greater collateral estoppel effect than a judgment fully affirmed.

The majority opinion's factual distinction is no more persuasive. Ford was permitted to raise a diminished capacity defense to the murder charge because that charge had been reversed and thus collateral estoppel was inapplicable. Ford was precluded from raising all other defenses collaterally estopped by his affirmed convictions on the other charges (robbery, kidnapping, etc.). Ford's retrial was fair--notwithstanding his being collaterally estopped from raising potential defenses--because application of the collateral estoppel doctrine is fair.

People v. Superior Court (Scofield) (1967) 249 Cal.App.2d 727 [57 Cal.Rptr. 818]

Defendants were charged with conspiracy and 28 counts of submitting false insurance claims. They were temporarily discharged when Superior Court Judge Lawler granted their motions to suppress the evidence (seized pursuant to a search warrant) and set aside the indictment (Sec. 995). But on appeal by the People, Judge Lawler's orders were reversed because another Superior Court judge, Judge Wapner, had previously upheld the seizure.

Justice Fourt, writing for Justices Wood and Lillie, stated: "We are persuaded that the principles of res judicata apply in criminal matters to bar a redetermination of identical issues decided in a prior proceeding instituted by the same parties. Once the prosecutor has convinced a trier of fact to find a certain fact (and that determination becomes final), he should not have the burden of proving again and again that same fact in court after court." (Id. at p. 735, 57 Cal.Rptr. 818.)

People v. One 1964 Chevrolet Corvette Convertible (1969) 274 Cal.App.2d 720

Frederick Busch borrowed his father's Corvette and later, when the police found marijuana in it, was convicted of marijuana possession. Thereafter, the police instituted forfeiture proceedings against the Corvette and Mr. Busch (the father) filed an answer denying that either he or his son knew there was marijuana in the car. The People moved for summary judgment (seeking collateral estoppel based upon Frederick Busch's conviction) but the motion was denied. A jury then returned a verdict denying forfeiture. The trial court, however, granted a new trial motion and, after some delay, summary judgment for the People (based upon collateral estoppel).

Justice Lillie, for a unanimous court, affirmed the judgment. She rejected Mr. Busch's claims that collateral estoppel should not be applied against him **[24 Cal.App.4th 175]** because he was not a party to the criminal proceeding, had no notice of it, was not in privity with any party, and no appeal had been taken. (Id. at p. 729.) Justice Lillie stated, "Collateral estoppel may be invoked to conclusively resolve any issue necessarily determined in previous litigation between the same parties or their privies." (Id. at p. 726.) Regarding "privies," Justice Lillie noted: "However, to maintain the stability of judgments, insure expeditious trials, prevent '"vexatious litigation with its attendant expense both to the parties and to the public"'

and to serve the ends of justice, more and more our courts are striving to give effect to judgments by extending 'privies' beyond the classical description to include relationships not originally embraced therein." (Id. at p. 731.)

People v. Taylor (1974) 12 Cal.3d 686

Defendant Taylor was to be the getaway driver for his confederate robbers, Daniels and Smith. But things did not go as planned. The intended robbery victims, Mr. & Mrs. West, fearing that gun wielding Smith would execute them as he threatened to do, each shot at Smith, killing him. Both Taylor and Daniels were charged with murder (causing Smith's death by inciting the Wests to shoot him) and robbery. Daniels, tried first, was convicted of robbery but acquitted of murder.

Taylor, tried second, was convicted of both robbery and murder. The Supreme Court reversed the murder conviction on collateral estoppel grounds. The Court stated: "Since defendant was sitting in the getaway car outside the store at the time of the shooting, his subsequent conviction for murder could result only upon a finding that one of his confederates, Daniels or Smith, harbored malice which the trier of fact then attributed to defendant because of his role as an aider and abettor. (See § 31.) At Daniels' trial the People already have sought and have failed to establish that either Daniels or Smith entertained the requisite malice aforethought. Defendant thus argues that the doctrine of collateral estoppel should have precluded the People from relitigating this identical issue at his later trial. We agree." (Id. at p. 691.)

In explaining why the prosecution could not prosecute Taylor even once for murder the Supreme Court cited strong policy considerations. Besides judicial economy ("even more important in criminal than in civil trials" (id. at p. 695)) and avoiding vexatious litigation, the Court underscored the importance of avoiding contradictory verdicts. It stated, "Perhaps the

most compelling reason for an application of collateral estoppel where vicarious liability is at issue is to prevent the compromising of the integrity of the judicial system caused by the rendering of inconsistent verdicts. **[24 Cal.App.4th 176]** Criminal trials generally receive more publicity than civil ones, and the public's view of the judicial system in general is often shaped by the impression of the fairness of the criminal justice system in particular." (Id. at pp. 695-696.)

People v. White (1986) 185 Cal.App.3d 822 [231 Cal.Rptr. 569]

On March 28, 1979, the bullet riddled bodies of Phyllis Lamboy and Darryl Charles were found in a vacant San Francisco housing project. Appellant was charged with their murders. At his first trial a jury convicted appellant of both first degree murders but found a firearm use allegation not true (there was evidence appellant's brother may also have been involved). On appeal, the convictions were reversed (improper hearsay evidence had been admitted).

At the second trial the prosecution relied on two theories: appellant was the shooter; appellant aided the shooter. The jury (without specifying which theory they relied on) again convicted appellant of both first degree murders.

The Court of Appeal reversed the convictions because the "shooter theory" had been collaterally estopped by the first jury's not true finding.

Although for almost all other purposes, an enhancement allegation such as firearm use (§ 12022.5) is an appendage to a substantive count, without independent viability, for collateral estoppel purposes a not true finding survives the death (reversal)

of the substantive count. This result[7/] fortifies our jury trial system and reduces the risk of contradictory jury findings.

Lucido v. Superior Court (1990) 51 Cal.3d 335

A finding, made at a probation revocation hearing, that defendant did not commit a crime will not bar a prosecution charging defendant with the commission of that crime.

Collateral estoppel is inapplicable, not because all its threshold requirements have not been satisfied, but because applying it would "undermine the [24 Cal.App.4th 177] public interest in determining criminal guilt and innocence at criminal trials." (Id. at p. 352. Emphasis added.)

This decision preserves and strengthens the vitality of our jury trial system.

People v. Percifull (1992) 9 Cal.App.4th 1457 [12 Cal.Rptr.2d 331]

Applying Lucido, Percifull holds that a finding, made at a dependency hearing, parents had not criminally abused their child will not bar a child abuse criminal conviction.

This holding affirms the primacy of jury trial in our criminal justice system.

7/ People v. Asbury (1985) 173 Cal.App.3d 362 [218 Cal.Rptr. 902], with similar facts, reaches the same result. See also People v. Griffin (1994) 22 Cal.App.4th 801 [27 Cal.Rptr.2d 721].

The majority opinion accepts the holding of White, Asbury, and Griffin: a jury's reasonable doubt finding collaterally estops the prosecution. What the majority opinion apparently does not accept is that a jury's finding beyond a reasonable doubt, which is affirmed and final on appeal, may have any collateral estoppel effect on a criminal defendant.

CONCLUSION

As California appellate decisions make clear, when the jury's finding -- that it was Abraham Gutierrez who shot Sandra Zarate -- became final, Mr. Gutierrez could not again "draw[ ] into controversy" (Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., supra, 58 Cal.2d 601, 605) that same issue.

Although Mr. Gutierrez would not benefit from this application of the collateral estoppel doctrine, other defendants would. Their last refuge is a jury trial. It, with all attendant protections -- presumption of innocence, proof beyond a reasonable doubt, unanimous verdict, right to counsel -- not only protects the innocent but also, given a reasonable doubt, the guilty.

But this last refuge -- expensive, time consuming, sometimes ineffectual -- perseveres only so long as it enjoys public confidence. That confidence is undermined by the "specter of a system" (People v. Taylor, supra, 12 Cal.3d 686, 696) which would allow one fair jury to find Mr. Gutierrez did shoot Sandra Zarate and another fair jury to find he did not. To permit such a "specter" is to encourage erosion of jury trial as we know it and to aid proposals for non-unanimous verdicts, for 10- or 8- or 6-person juries, and for further elimination of jury trial for "minor" offenses.

Jury trial is the cornerstone of our justice system. I would preserve not degrade it. For that reason, I respectfully dissent.

CERTIFIED FOR PUBLICATION.

WOODS, (Fred), J.

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SECOND APPELLATE DISTRICT
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DIVISION: 7 DATE: 05/10/94

Appellate Division
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11th Fl.
Los Angeles, CA. 90014

RE: Gutierrez, Abraham
vs.
S.c.l.a.
People of the State of California
2 Criminal B078255
Los Angeles NO. KA016953

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Seven, No. B078255
S034957

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

ABRAHAM GUTIERREZ, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent
THE PEOPLE, Real Party in Interest

Supreme Court
FILED
AUG 11 1994
Robert Wandruff
Clerk

Deputy
[stamp]

Petition for review DENIED.
Kennard, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

GIL GARCETTI
District Attorney
of Los Angeles County
849 South Broadway, 11th Floor
Los Angeles, California 90014-3570
Telephone: (213) 974-1615
Attorney for Plaintiff and Appellant

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[P.J.]
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

ABRAHAM GUTIERREZ, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	) No. B078255) (LASC No. KA016953,) Honorable Alfonso M.) Bazan, Judge)) APPLICATION FOR) STAY OF ISSUANCE) OF REMITTITUR) (IMMEDIATE STAY) REQUESTED)

[Text of request for stay, ending with the prayer:]

WHEREFORE, the People, applicant herein, respectfully request that this honorable court stay the issuance of the remittitur in this case for good cause until November 9, 1994, pursuant to Rule 25(c) of the California Rules of Court, in order to permit the filing by the People of the State of California a

petition for writ of certiorari with the Supreme Court of the United States, or until such earlier date that the People advise this court of any decision to not pursue certiorari, and that, upon the timely filing of such petition, said stay and order remain in force until final adjudication of the proceeding in the Supreme Court of the United States.

[Declaration under penalty of perjury and signature.]

California statutes and rules involved in the issues

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE, § 187, subd. (a) (1994).

"All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree." CAL. STATUTES 1982, chap. 950, § 1 (current version at CAL. PENAL CODE, § 189, 1st ¶ (1994)).

"Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life." CAL. STATUTES 1987, chap. 1006, § 1 (current version at CAL. PENAL CODE, § 190, subd. (a), second par. (1994)).

"To make the killing either murder or manslaughter, it is requisite that the party die within three years and a day after the stroke received or the cause of death administered." CAL. PENAL CODE, § 194, first sentence (1994).

"Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and

not exceeding one year. CAL. PENAL CODE, § 246, first par. (1994).

"Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

"1. **Offenses punishable by imprisonment in the state prison.** . . . [I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole; . . . . The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." CAL. PENAL CODE, § 664, subd. 1 (1994).

"(a) Except as provided in subdivisions (b) and (c), any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for three, four, or five years, unless use of a firearm is an element of the offense of which he or she was convicted. . . .

"(b) Notwithstanding subdivision (a), any person who is convicted of a felony or an attempt to commit a felony, including murder or attempted murder, in which that person discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to the person of another, . . . shall, upon conviction of that felony or attempted felony, in addition and consecutive to the sentence prescribed for the felony or attempt-

ed felony, be punished by an additional term of imprisonment in the state prison for five years." CAL. STATUTES 1989, chap. 1167, § 5 (current version at CAL. PENAL CODE, § 12022.5, subds. (a), (b)(1) (1994); formerly § 12022.5, subds. (a), (b) (1990)).

"Any person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of three years, unless infliction of great bodily injury is an element of the offense of which he is convicted.

"As used in this section, great bodily injury means a significant or substantial physical injury.

"This section shall not apply to murder or manslaughter . . . . The additional term provided in this section shall not be imposed unless the fact of great bodily injury is charged in the accusatory pleading and admitted or found true by the trier of fact." CAL. STATUTES 1979, chap. 145, § 17 (current version at CAL. PENAL CODE, § 12022.7, subds. (a), (d), (e) (1994)).

"A decision of a Court of Appeal becomes final as to that court 30 days after filing." CAL. RULES OF COURT, RULE 24(a), 3rd par., 1st sent.

Supreme Court, U.S.
FILED
MAR 7 - 1995
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No. 94-746

In The

Supreme Court of the United States

October Term, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ABRAHAM GUTIERREZ,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Division Seven

BRIEF IN OPPOSITION

H. RUSSELL HALPERN
HALPERN & HALPERN
Attorneys at Law
The Laurel Plaza Office Building
6180 Laurel Canyon Blvd., Suite 172
North Hollywood, California 91606
(213) 872-2355 - (818) 508-0063
Fax (818) 508-6045

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (602) 342-2831

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QUESTION PRESENTED

The Respondent was convicted of attempted murder. Subsequent to his conviction the victim died. The District Attorney of Los Angeles, California, then filed a charge of murder in the second degree against the Respondent. The Petitioner now seeks to bar the Respondent by way of collateral estoppel, from litigating the issues of identity and malice.

The issue presented before this Court is whether collateral estoppel can be used by the Prosecution to obtain a jury instruction that, as a matter of law, some element of the crime charged has already been proved, without violating the Respondent's Sixth Amendment right to a jury trial, and his right to a fair trial pursuant to the Due Process Clause.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Abraham Gutierrez respectfully proposes that a writ of certiorari to review the judgment of the Court of Appeal for the State of California, Second Appellate District, Division Seven not be granted.

OPINION BELOW

The opinion of the Court of Appeal (Pet. App.) is reported as *Gutierrez v. Superior Court*, 24 Cal.App.4th 153, 29 Cal.Rptr.2d 376 (1994).

JURISDICTION

The Court issued an opinion granting Respondents petition for writ of prohibition on April 15, 1994, and denied a rehearing on May 10, 1994. The California Supreme Court, on August 11, 1994, denied the Petitioner's petition for review. Title 28, United States Code, section 1257 (a), confers jurisdiction on the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Article III § 2

"The trial of all crimes, except in cases of impeachment, shall be by jury: . . . "

United States Constitution Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . "

United States Constitution Amendment XIV § 1

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The Respondent has read and considered the statement of the case contained in the Petitioner's Petition For Writ of Certiorari, found at pages 3 through 9 and adopts the same haec verba.

REASON WHY WRIT SHOULD NOT ISSUE

(I)

THE DECISION BELOW WAS CORRECT

The Court of Appeal in holding that collateral estoppel cannot be used affirmatively by the prosecution rested its decision on two grounds. The first being that "[t]he assertion of collateral estoppel by the prosecution deprives petitioner of the right to present his defense to

the jury." (24 Cal.App.4th 169) Secondly, the Court questioned whether a murder trial, where the only issue presented to the jury was that of causation, and a jury so instructed in that manner, would not unduly prejudice the jury as to that issue. The Court stated, "This is so because a jury so instructed could not help but infer that the defendant had either admitted the other issues or another jury had already decided them against him. Either inference creates 'a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations.' (State v. Ingenito, supra, 432 A.2d 912, 918-919.)" (24 Cal.App.4th 170).

Collateral estoppel, although first developed in civil litigation, has been applied in criminal cases. *Ashe v. Swenson,* 397 U.S. 436, 443-444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469, 475-475 (1970). However, the doctrine has been employed in criminal prosecutions primarily by formerly acquitted defendants; and, in that context, has been viewed as derivative of the Fifth Amendment's guarantee against double jeopardy for the same offense. *Ashe v. Swenson,* (supra), *United States v. Kramer,* 289 F.2d 909, 913 (2d Cir. 1961); *United States v. Richard,* 892 F.2d 761 (9th Cir. 1990); *United States v. Hernandez,* 572 F.2d 218, 220 (9th Cir. 1978). "The Use of Collateral Estoppel Against the Accused," 69 Colum. L.Rev. 515 (1969). The affirmative use of collateral estoppel against a defendant in a criminal prosecution is not predicated upon any constitutional mandate. Quite the opposite, the use of this evidentiary tool, would deny the Respondent his Due Process right "against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 258, 264 (1970). This Court in *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) found that jury instructions that would relieve the state of its burden to prove every element of the charged offense violated the Due Process Clause. The Court "[S]uch directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases" (109 S.Ct. 2419, 2420).

Although this Court has not separately addressed the question whether a criminal defendant may be estopped from contesting an essential element of a charged offense, the direction that the Court has taken in other cases indicates that affirmative use of collateral estoppel by the prosecution would not be tolerated by the Court.

In *United States v. Dixon*, 509 U.S. ___, ___, n.15, 133 S.Ct. 2849, 2863-2864 n.14, 125 L.Ed.2d 556, 577, n.15 (1993), Justice Scalia, writing for four justices, observed that "Under *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 459 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to a second one – though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time."

Aside from cases involving alienage, the majority of Federal courts have not allowed the doctrine of collateral estoppel to be used by the Prosecution. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); *United States v. DeAngelo*, 138 F.2d 466 (3d Cir. 1943); *United States v. Bruno*, 333

F. Supp. 470, 476 (E.D.Pa. 1971); *United States v. Carlisi*, 32 F. Supp. 479, 482 (1940) c.f.; *United States v. Colacurcio*, 514 F.2d 1 (9th Cir. 1975).

There have been federal cases that have been willing to allow the prosecution to use collateral estoppel affirmatively when the issue was one of status. One of those cases is *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975). In *Hernandez-Uribe* (supra) the defendant was convicted in the United States District Court for the Southern District of Iowa, of being an alien who, having previously been arrested and deported from the United States, unlawfully reentered the country. The Court of Appeal held that where the defendant had previously pled guilty to the same charge he was precluded by collateral estoppel from relitigating the issue of whether he was an alien. The court spoke of collateral estoppel in terms of establishing the defendant *status* as an alien stating:

> "The instruction given was based on the application of collateral estoppel to an alien in *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). In that case the Ninth Circuit held that the Government could invoke the doctrine of collateral estoppel against the defendant and establish his alien status up to the date of the earlier conviction. The court adopted the reasoning of an earlier district court case, *United States v. Rangel-Perrez*, 179 F. Supp. 619 (S.D.Cal. 1959) when it said: [i]f the issue of alienage were to be tried each time a defendant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present. Even though the present risk of

> prosecution for illegal entry would remain under 8 U.S.C. 22 § 1326, a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict and accomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would be weakened". (515 F.2d. 21)

The underlying rationale justifying the application of collateral estoppel *Hernandez-Uribe v. United States,* (supra), *U.S. v. Rangel-Perez,* (supra) and the California case *People v. Majado,* 22 Cal.App.2d 323 (1937), appears to be the need to preserve judicial resources when an unchanging issue has been determined by a prior conviction. For instance, in *People v. Majado,* supra, the court characterized the crime as a "continuing one," which could result in "the expense of many trials before this . . . child reaches it majority, in each of which the fact of parentage must again be established," if collateral estoppel is not applied. Similarly, the *Rangel-Perez* Court reasoned that, if a defendant was not bound by an earlier determination of alienage, he or she "would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict" *Rangel-Perez,* supra at 626. The policy considerations that prompted the courts to allow the implication of collateral estoppel, as an offensive tool of the prosecution in the foregoing mentioned cases, is not present in the case at bar.

Cases involving alienage can be further distinguished from the case at bar. In the alienage cases, the conduct that led to the second or subsequent prosecution occurred after the judicial determination that was held to have barred relitigation. In this case, as in the cases of *People v. Goss,* 446 Mich. 5871 (1993); *United States v. Pelullo,* 14 F.3d 881 (3d Cir. 1994), the conduct preceded the judicial determination sought to be raised as a bar.

The majority of the states which have dealt collateral estoppel in criminal cases have held that it is not available to the prosecution. *People v. Coss,* 200 Mich.App.9, 503 N.W.2d 682 (1993); *State v. Ingenito,* 87 N.J. 204, 432 A.2d 912 (1981); *In re Susi et al.,* 38 Ohio App.2d 73, 313 N.E.2d 422 (1973); *State v. Johnson,* 594 A.2d 1288 (N.H. 1991); *State v. Stiefel,* 256 So. 581 (Fla. 1972).

The Court of Appeal found that use of collateral estoppel by the prosecution would deny the Respondent his right to a fair and impartial jury trial. The Respondent finds that Court's decision could be supported on grounds other than those stated in their opinion. If the Petitioner were allowed to include in the present trial, findings of fact stemming from his first trial for attempted murder, then his first trial would in effect have been transformed ipso facto into a trial for murder. Such a procedure would violate the Sixth Amendment guarantee given to an accused "to be informed of the nature and cause of the accusation".

The idea of having two different juries, each deciding a different portion of the elements of the crime charged, would be, in effect, a bifurcation of the trial. Although bifurcated trials are employed in various cases such as

prior convictions, penalty phase of a murder trial, or, in some instances, having two juries in multi-defendant cases, the bifurcation is always with the consent of the defendant. Of more importance is that the first portion of this bifurcated trial, which the Petitioner has proposed, would take place without the Respondent having been arraigned on the charge of murder. At the Respondent's trial for attempted murder, he was not informed that the evidence to be presented would, at some later date, be incorporated in a trial for murder. Notice of the specific charge against a defendant is a fundamental Constitutional right. Justice Black, delivering the opinion of the Court in *Cole v. State of Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), wrote:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made". (333 U.S. 201, 68 S.Ct. 517)

CONCLUSION

The decision of the State Court of Appeal was correct. A grant of certiorari would not serve any useful purpose, and therefore should be denied.

Respectfully submitted,

H. RUSSELL HALPERN
Attorney for the Respondent